



FEDERALLY SPEAKING



by Barry J. Lipson

Number 43

Welcome to **FEDERALLY SPEAKING**, an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 43rd column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania: <http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm> [note revised web address].

 **TOMORROW'S** 

TRIALS  **TODAY!!!**

NEW DATE IS: FRIDAY, AUGUST 27, 2004 !!!

PRESIDENT BUSH Decreed: "**No Tomorrow's Trials Today!!! on PRESIDENT REAGAN'S MEMORIAL DAY!**" But take heart, you can still be part of the *Futuristic League* of far-flung league-traveling colleagues from *Cleveland, Erie, Pittsburgh and Harrisburg* at the **Pittsburgh Federal Courthouse** on **Friday, August 27, 2004**. Join the *FBA West Penn Chapter's* whirlwind one-day trip into the mind-bending electronic computer world of *Tomorrow's Trials Today!!! Science Fiction?* No, much of it is **Science Fact**, in practice or on the drawing board! And with "real-time" technology you may now be able enjoy that normally unavailable "*second bite of the apple*!!" All this, a delightful City Deli Lunch (with apple), and 7.0 hours CLE, include one hour of ethics, for \$99.00 (\$79.00 for current and new FBA members). *For reservations contact: Carmine DiPaolo, Fifteenth Floor, Two Gateway Center, Pittsburgh, PA 15222-1447 (412/281-4900; carmined@springerlaw.com).* *To view complete Program details visit <http://www.pawd.uscourts.gov>.*

LIBERTY'S CORNER

PRESUMED INVALID: CONTENT-BASED SPEECH RESTRICTIONS! So saith the **Supremest Court of the Land**: "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the **Constitution** demands that content-based restrictions on **speech** be presumed invalid and that the Government bear the burden of showing their **constitutionality**." *Ashcroft v. ACLU (II)*, No. 03-218 (US Sup Ct, June 29, 2004). For the "rest of the story" see "*Plausibly Pondering Pandering Porn!*," below.

"THIS IS A GOOD DAY FOR THE RULE OF LAW." The U.S. Supreme Court's refutations of the **Bush Administration's** attempted denial of *habeas corpus* review to detainees and "enemy combatants," was so proclaimed by retired **Third Circuit U. S. Court of Appeals** Chief Judge John Joseph Gibbons, a Nixon appointee. While Judge Gibbons may have been somewhat biased, having represented the Guantanamo detainees in oral argument, the vast majority of the **Justices of the U.S. Supreme Court** appear to share his view. That day was June 28, 2004 and the cases decided were *Rasul v. Bush*, No. 03-334, involving Kuwaiti and Australian Guantanamo detainees, and *Hamdi v. Rumsfeld*, No. 03-6696, involving Yaser Esam Hamdi, a **U.S. citizen** being held in the **U.S.** after he was taken into custody in Afghanistan, both of which were decided against the **Administration's** position by differing 6-3 majorities. Indeed, in *Hamdi* two dissenters, Justices Scalia and Stevens, believed the majority *had not gone far enough* and that the

Great Writ of habeas corpus could only be suspended by an **Act of Congress**, making it actually 8-1 against the **Administration**. As Justice O'Connor, writing for the **Court**, stressed in *Hamdi*: "We have long since made clear that a state of war is not a blank check when it comes to the rights of the nation's citizens," and the "threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's **core rights** to challenge meaningfully the government's case and to be heard by an independent adjudicator." Without going further, the **Court** also held that Hamdi *'unquestionably* has the **right to access to counsel** in connection with the proceedings on remand." Emphasis added. In *Rasul*, writing for the majority, with regard to **non-U.S. citizens** held on foreign soil controlled by the **U.S.**, Justice Stevens answered "*in the affirmative*" the question: Do "the **Federal Courts** have **jurisdiction** to determine the legality of the executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing?" And the **Court** held that included within the ambit of this **Federal Court jurisdiction** is "territory over which the **United States** exercises exclusive jurisdiction and control," to wit, the Guantanamo base leased from Cuba (even though the **Feds** specifically chose Guantanamo because it was on foreign soil). And what does this mean? Three dissenting Justices tell us *Rasul* is a "breathtaking" extension of foreigner's rights, which "boldly expands the scope of the **habeas statute** to the four corners of the earth." However, exercising this **Term's "guiding light"** of deciding *as often as it can as little as it can*, as with the questions of **right to counsel** above and coping with **COPA** below (see also *Federal Speaking* No 42), in the third case, *Rumsfeld v. Padilla*, No. 03-1027, the **U.S. Supreme Court** did not "soil" itself with substance, but rather ruled 5-4 that Jose Padilla, a **U.S. citizen** seized on **U.S. soil** (not as **U.S. citizen** Hamdi on foreign soil), had had his **habeas corpus** petition filed for him in the "**wrong**" **District**, the **U.S. District Court for the Southern District of New York**, the **Court** that had issued the original "**material witness warrant**" under which he was taken into **Federal** custody in the first place, and not the **U.S. District Court for the District of South Carolina**, the "**right**" **District**, the one where Padilla immediate **Federal** custodian is located (though while in **Federal** custody the **Feds** had intentionally moved him from New York to South Carolina), but so ruled "**without prejudice**," thus permitting re-filing. [Query, where and on whom does one re-file if the **Feds** again moves Padilla and this time keep secret his new location?] But it was still, indeed, "*A Good Day For The Rule Of Law*," as the **High Court** not only upheld the **core rights** to challenge meaningfully the government's case," but also "made clear that, unless **Congress** acts to suspend it, the **Great Writ of habeas corpus** allows the **Judicial Branch** to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the **Executive's** discretion in the realm of detentions." And who would be the final "adjudicator" of whether or not a suspension by **Congress** of the **Great Writ of habeas corpus** was itself **constitutional**? Why, the **U.S. Supreme Court**, of course!

FED-POURRI™

"MALO ARBITRATUS REPRESENTATUS LABORIUS IMMUNO MALOPRACTIUS." Straight out of *Blackstone* (1723-80), memorializing the time honored legal doctrine that "even he who labors badly and arbitrarily for his laboring client is immune from malpractice attack?" Not quite time honored, but that is what the unanimous **U.S. Third Circuit Court of Appeals** three-judge panel ruled in *Carino v. Stefan*, No. 03-3679P (July 19, 2004), with regard to the alleged malpractice in an arbitration proceeding of a lawyer retained by the union for its arbitrating member. Writing for the **Court**, Pennsylvania Governor Ed Rendell's wife, **U.S. Third Circuit Judge Marjorie O. Rendell**, advises that the **Taft-Hartley Labor Management Relations Act of 1947**, 29 U.S.C. §185(b) [**LMRA** §301(b)], "immunizes attorneys employed by or hired by unions to perform services related to a collective bargaining agreement from suit for malpractice." Quite nice! Shouldn't this be expanded to cover all legal malpractice? Perhaps Medical Doctors would resume treating attorneys if this was expanded to also cover them? No such luck! As the **Court** explains, this is a very limited gift from **Congress** to unions, which the **First, Second, Ninth and Tenth Circuits** have already found their way clear to expand to include union-provided legal counsel. More precisely Judge Rendell advises, **LMRA** §301(b) permits monetary awards against unions to be "enforceable **only** against the organization as an entity and against its assets, and shall **not** be enforceable against **any individual member or his assets**," which in 1962 the **U.S. Supreme Court** held "evidences a **Congressional** intention that the union as an entity, like a corporation, should in the absence of an agreement be the sole recovery for injury inflicted by it" (*Atkinson v. Sinclair Refining Co.*, 370 U.S. 238); and in 1982 further held that this would be

true “whether or not the union participated in or authorized the illegality” (*Complete Auto Transit Inc. v. Reis*, 451 US 401). Since then four **Federal Circuits**, now five, have ruled that *Atkinson’s* “prohibits claims made by a union member against attorneys employed by or retained by the union to represent the member in a labor dispute.” While *negligence* is the basis of a legal malpractice claim, Judge Rendell points out, a union member with a claim against a union’s breach of its duty of fair representation must show that the union’s actions were “*arbitrary, discriminatory, or in bad faith.*” Accordingly, “it would be anomalous if the union attorney could be liable if merely **negligent**, while the union would be liable only if a higher standard were met, namely, **arbitrariness or bad faith.**” Moreover, longer **Statutes of Limitations** may apply to such malpractice claims. Emphasis added. Good law? Good public policy? Read on.

THE OTHER SHOE! *Toastmaster’s International San Diego Club No. 1808* has a special award, the *Dennis Roberts Shoe-in-Mouth Award*, that can “go to a person, place, or thing that has never attended an 1808 breakfast, such as Pee-Wee Herman, Santee [“San Diego East County’s Best Kept Secret!”], or The Budget Deficit,” and the awarding of which “can be funny, or it can be a way to rein in egregious behavior.” Could the **Third Circuit’s** *Carino v. Stefan*, *above*, be a worthy nominee for such an award? Does that decision contain the “*Other Shoe*” that has not yet dropped here? Let’s look inside the gulags (oops! galoshes) and see if there are any sidestepping spiders. The **Third Circuit** accepted as true that Gisela Carino’s union-provided counsel *deceived her* into believing she was withdrawing her arbitration grievance in exchange for “her employment record [being] cleared of Prudential’s false charges; the **FBI** investigation closed; a promise that Prudential would not sue her for attorney’s fees; and her pension reinstated,” *which was not true*, but concluded that “while he *may have deceived Carino into withdrawing her grievance*, advising her to withdraw was an activity performed in relation to the collective bargaining agreement,” and therefore he would not be liable to her for legal malpractice. As justification for this conclusion the **Court** rationalized that if malpractice attached *lawyers could be penalized for outcomes “flowing from the union’s political or tactical choices.”* Emphasis added. But doesn’t this raise the spectre, quite often present in cases where insurance carriers provide legal representation for insureds, *of to whom do attorneys owe their primary allegiance?* Isn’t it *Hornbook Law* that their primary duty is always to the ones they are representing, to wit, the union members and insureds, and not to the “controllers of the purse strings?” Indeed, there are horror stories out there of Corporate Counsel finding it necessary to retain “special counsel” to “watch” carrier-provided counsel; and of normally adroit third party paid practitioners maladroitly uttering to their client *of record*: “I can’t do that, whom do you think I’m expecting to put my kids through college?” But that’s grist for another column Here, two questions need answered. First, how does **Labor Management Relations Act** §301(b) apply at all as *on its face* it is limited to only insulating an “*individual member*” of the union “or his assets,” and it is most doubtful that legal counsel retained by the union would be such a union member? Second, as a matter of *public policy* can our profession be allowed to sidestep its responsibility to its primary clients, the clients it represents *of record*? Hasn’t Ms. Carino missed out on *fair representation* here and been careened way passed *due process*? Will not dropping this “other shoe” risk detonating the shoe-bomb within, and/or risk yanking the nail from that horseshoe which lost the kingdom? **Attention Lawyers Disciplinary Board:** Does Ms. Carino have a case for you (if she’s not *too late* filing)?

FOLLOW UP

MANDATORY SENTENCES ON MANDATORY SENTENCING. In *Blakely v. Washington*, U.S. Sup. Ct. No. 02-1632 (June 24, 2004), the **High Court** again threw its hat forcefully into the sentencing arena by holding in a 5-4 decision that because the facts supporting Blakely’s judicially expanded sentence were neither admitted by him nor found by a jury, the sentence violated his **Sixth Amendment right to trial by jury**. The facts admitted by Blakely in his guilty plea to kidnapping his estranged wife, standing alone, would support a maximum sentence of 53 months under the **Sentencing Guidelines**, but the judge imposed a 90-month sentence after finding that Blakely had acted with deliberate cruelty, a statutorily enumerated ground for upward departure from the standard range. In doing so the **U.S. Supreme Court** applied the rule of *Apprendi v. New Jersey*, (530 U.S. 466, 490 (2000)), that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” To say the least, this decision has let the fox into the

sentencing hen house, which has already been under assault by many members of the **Federal Judiciary** who, as voiced by **U.S. Supreme Court** Chief Justice William Rehnquist on “New Year's Day 2004,” are incensed over **Sentencing Guidelines** “which impinged on judicial independence and could ‘intimidate individual judges’” (*Federally Speaking* No. 42; see also *Federally Speaking* Nos. 36, 34, and 33). The most extreme judicial reaction as of this writing appears to be that of **U.S. District Court** Judge Gregory A. Presnell of the **Middle District of Florida (Orlando Division)**, who in *US v. King*, No. 6:04-CR-35 (July 19, 2004) reasoned that: “Taking *Blakely* to its logical conclusion, the determinate scheme set up by the **Guidelines** violates the **Constitution** and *can no longer be used in any case*,” though he also notes that he “will continue to rely on the **Guidelines** as recommendations worthy of serious consideration” (Slip Op 12), which seems appropriate as “**Guidelines**” by definition simply constitute “information intended to *advise* people on how something should be done.” Emphasis added. In another **U.S. District Court**, Judge Paul Cassell of the **District of Utah** advised that until the **constitutionality** of the **Sentencing Guidelines** is determined, two sentences will be announced, a sentence in accordance with the **Guidelines**, and a sentence that would be imposed if the **Guidelines** are declared **unconstitutional**. Ironically, by removing *judicial discretion* as to upward departures, the **High Court** may be returning to the **Judiciary discretion** with regard to maximum/minimum sentences and sentencing generally. Could this be reminiscent of what it did in *Marbury v. Madison*, 5 US 137 (1803), where by holding that **Congress** did not have the power to increase the **High Court’s** own original jurisdiction, the **High Court** successfully established its power to declare **Acts of Congress unconstitutional**? (See *Federally Speaking* No. 39.)

PLAUSIBLY PONDERING PANDERING PORN! That in effect is the assignment the **U.S. Supreme Court** gave to the **U.S. District Court for the Eastern District of Pennsylvania** when in a 5-4 decision it sent back *Ashcroft v. ACLU (II)*, No. 03-218 (U.S. Sup. Ct., June 29, 2004) to that **Court** for the second time, this time to further ponder “plausible, less restrictive alternatives” to the **Child Online Protection Act of 1998 (COPA)**, which criminalizes the placing of “adult material” on commercial Internet websites viewable by minors, while still keeping alive the **1998 Injunction** that has enjoined the **Government** from enforcing **COPA**. And also instructing the **District Court** that with regard to “content-based restrictions on speech ... the **Government** bear the burden of showing their **constitutionality**,” and if the **Government** fails to do so these restrictions are “*presumed invalid*.” Presumptively a victory for the **First Amendment!** (See *Liberty’s Corner*, “Presumed Invalid: Content-Based Speech Restrictions!,” above, quoting Justice Kennedy’s majority opinion; and for prior history see *Federally Speaking* Nos 15, 17 and 31.)

HIGH COURT UNTANGLED! Last month we reported that “tangled in tape,” the **Supremes** are “stuck on whether to grant **Certiorari** in *LePage’s Inc. v. 3M Co*, 324 F.3d 141 (3rd Cir 2003); cert. filed No. 02-1865 (June 20, 2003), where a **Federal** jury has awarded \$68 million to LePage’s, after trebling, in an **Antitrust** proceeding [against “3M Company,” pre-April 2002 officially “Minnesota Mining and Manufacturing Company”] in which LePage’s accused 3M of trying to drive it out of the market for ‘Scotch’ – oops! ---Transparent Tape, by offering large retailers ‘bundled rebates’ covering a wide spectrum of 3M products.” Pittsburgh-based “LePage’s convinced the jury, they could only earn [such rebates] by leaving LePage’s tapes out of their purchase mix.” The **Justices** asked the now former **U.S. Solicitor General** for “*la/le page*” to look at to help disentangle and unstick them (see *Federally Speaking*, No.42). His advice was do not even open that book as there “is no pressing need for the **Court** to address the matter at this time,” and as this case “does not present an attractive vehicle for this **Court** to attempt to provide ... guidance.” Whereupon, the **Supremes** sub-vocalization “M-M-M” and declined to grant **Certiorari**. Thus, in effect, outlawing such practices at least in the **Third Circuit** (where this “hefty” [not to be confused with Mobil’s **HEFTY®**] mega-buck award had been affirmed – but that’s a horse of different transparency); and leaving a judicial score of *Pittsburgh 3, Minnesota 0!*

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